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Nos. 91-2072, 92-119

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TONY AVIRGAN and MARTHA HONEY,

and

DANIEL P. SHEEHAN and THE CHRISTIC INSTITUTE,

Petitioners,

v.

JOHN HULL, *et al.*,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly decided that the appeals were frivolous?

2. Whether the Court of Appeals was required, after thoroughly considering appeals and issuing an opinion affirming the District Court on the merits and on its imposition of sanctions for filing a frivolous lawsuit, to further issue a separate opinion with detailed findings of the specific basis for its holding that the appeals were frivolous?

PARTIES TO THE PROCEEDING

Petitioners Tony Avirgan and Martha Honey were plaintiffs in the District Court, Southern District of Florida, and appellants in the Court of Appeals. They were represented in the District Court by Petitioner, Daniel P. Sheehan and The Christic Institute.

Respondents John Hull, Jorge Gonzalez, Adolfo Calero, Robert Owens, John Singlaub, Ronald Joseph Martin, Sr., James McCoy, Mario Delamico, Theodore Shackley, and Richard Secord were all defendants in the District Court and appellees in the Court of Appeals. They were awarded attorneys' fees by the District Court, and by the Court of Appeals which were imposed against petitioners. The remaining named respondents (some of whom were never served with process) were: Bruce Jones, Rene Corbo, Felipe Vidal, Moises Dagoberto Nunez, Francisco Chanes, Ramon Cecilio Palacio, Ricardo Gris, William Gris, Roger Lee Pallais, "Amac Galil",[1] Hector Cornillot, Alvaro Cruz, Frederico Saenz, Tom Posey, Rafael Quintero, Tom Clines, Albert Hakim, Pablo Escobar and Jorge Ochoa[2]—were also defendants-appellees, but the Court of Appeals did not award them attorneys' fees.

This Brief of Respondents is in opposition to the Petitions for Certiorari of Petitioners Avirgan and Honey, Daniel Sheehan and The Christic Institute.

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[1] This was a name given by Petitioners to a person alleged to have set the bomb at the La Penca press conference. They also called him "Per Anker Hansen."

[2] Mr. Escobar and Mr. Ochoa are alleged to be members of the Medellin, Colombia, drug cartel. While named by petitioners as defendants, they were never served nor did they participate in the case.

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OPINIONS BELOW

The order of the Eleventh Circuit [1] which imposed sanctions for the frivolous appeals was not reported, but appears in Petitioners Appendix ("Pet. App.") at 1a-2a. The order denying rehearing is also unreported and appears at Pet. App. 26a. The opinion of the Court of Appeals affirming the decisions of the District Court on both the merits and sanctions appears at Pet. App. 3a-25a and is reported at 932 F.2d 1572. That opinion was the subject of unsuccessful Petitions for Certiorari to this

[1] The panel consisted of Circuit Judges Hatchett and Birch and Senior Circuit Judge Roney.

Court. See Supreme Court Case Nos. 91-617, 91-618, 91-619. The opinion and order of the District Court on the merits and on sanctions are reported at 691 F.Supp. 1357 (S.D. Fla. 1988) 705 F.Supp. 1544 (S.D. Fla. 1989), and 125 F.R.D. 189 (S.D. Fla. 1989).

JURISDICTION

The order of the Court of Appeals awarding sanctions on appeal was entered on February 26, 1992. On May 14, 1992, Justice Kennedy signed an order extending the time to file a petition for a writ of certiorari to and including June 25, 1992. The jurisdiction of this Court is alleged to be invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Tony Avirgan and Martha Honey, his wife, were American journalists based in Costa Rica. On May 30, 1984, during the Nicaraguan Civil War, Tony Avirgan attended a press conference held by Nicaraguan "Contra" leader Eden Pastora on the island of La Penca in the San Juan River on the Nicaraguan/Costa Rican border. At the press conference a bomb exploded killing eight people and wounding others. On May 29, 1986, Avirgan and Honey filed a complex, multi-faceted complaint in the United States District Court for the Southern District of Florida for damages allegedly arising from the bombing.

Tony Avirgan alleged that his index finger was injured in the explosion and that his camera equipment was damaged. He and his wife, through Mr. Sheehan and The Christic Institute, sued for $22,000,000.00 for alleged damages.

Avirgan and Honey claimed that the bombing was the product of a wide ranging conspiracy among members of the U.S. Government and a criminal racketeer-influenced and corrupt organization (RICO) consisting of Central Intelligence Agency operatives, military intelligence personnel, arms merchants, mercenaries, Colombian drug lords, and the Nicaraguan "Contras."

Avirgan and Honey's racketeering allegations included the following: the attempted murder of Eden Pastora; the murder of eight persons at the press conference in La Penca; the attempted murder of Avirgan at the La Penca bombing; trafficking of arms and explosives in violation of state and federal law; transferring funds from illegal weapons and explosives dealings; conspiracies to murder Eden Pastora on two occasions; conspiracy to kidnap Avirgan and Honey's alleged informants (Carlos Rojas Chinchilla and a person identified only as "David"); the murder of "David"; a conspiracy to import cocaine into the United States; and a conspiracy to murder the United States Ambassador to Costa Rica. The primary allegation, however, was that "Amac Galil," disguised as a journalist named "Per Anker Hansen," detonated the bomb at the La Penca press conference, and acted in concert with the twenty eight other persons (including the leaders of the Medellin Cartel) named in the amended complaint.

Avirgan and Honey also alleged state law claims which included: battery, loss of consortium, assault, intentional infliction of mental distress, trespass, damage to personal property, and a state RICO claim under Fla.Stat. § 895.03.

Petitioners requested wide, liberal discovery which was permitted on the basis of Sheehan's sworn Affidavit summarizing the testimony of 79 "secret" and undisclosed persons who Sheehan represented would substantiate the allegations of the lawsuit. These secret sources allegedly included FBI agents, DEA agents, a priest, a farm worker, drug dealers, CIA employees, etc.

Two years of vigorous, spirited, and expensive litigation ensued. In the last four and one-half months prior to the entry of Summary Judgment, exhaustive discovery took place consisting of dozens of depositions noticed by Petitioners, numerous sets of interrogatories and production of thousands of pages of documents. Petitioners filed

a list of over 2,000 witnesses to be called at trial by Petitioners.

Several Respondents moved for Summary Judgment alleging that Avirgan and Honey had failed to produce evidence to support any claim. In addressing this motion, the District Court, Chief Judge James Lawrence King, thoroughly analyzed the evidence that Avirgan and Honey presented in order to determine whether they had shown genuine issues of material fact. Finding the purported "evidence" to in fact be inadmissible third and fourth-level hearsay, the District Court ruled that Avirgan and Honey failed to adduce admissible evidence sufficient even to raise a factual issue that the Respondents were the proximate cause of their injuries and granted Respondents' motions for summary judgment on all claims. *Avirgan v. Hull*, 691 F. Supp. 1357 (S.D. Fla. 1988).

The District Court, by a subsequent order, granted Respondents' motions for costs and attorney's fees, ruling that the demonstrated abuse of the judicial process required that Avirgan and Honey, as well as Mr. Sheehan and The Christic Institute, make the Respondents whole by paying the fees the Respondents were forced to spend in defending the lawsuit. Moreover, the District Court ruled that liability for these costs and fees rested jointly and severally with Avirgan and Honey, Daniel Sheehan and the Christic Institute. *Avirgan v. Hull*, 705 F.Supp. 1544 (S.D. Fla. 1989).

The central basis on which the District Court imposed sanctions award was the conduct of Petitioners. Tony Avirgan and Martha Honey were not typical passive clients. First, they prepared an alleged "investigative" report ("The La Penca Report") which was a cornerstone of the lawsuit and The Christic Institute fundraising efforts to support the lawsuit. They were intimately familiar with the facts and the allegations they were making about the Defendants. As journalists and clients, they actively participated in virtually every part of the

litigation, attending depositions (most of which were videotaped and functioned as press events as well), making speeches and giving press conferences throughout this country and others. They admitted that during the case they reviewed the pleadings and affidavits. They actively participated in the political campaign which Mr. Sheehan and The Christic Institute waged concurrently with, and as part of, the lawsuit. They travelled extensively allegedly "investigating" the lawsuit. They participated in the numerous publications (some of which were pleadings filed in the case) which The Christic Institute sold to raise money for the lawsuit. They assisted in the numerous concerts and other fundraisers and direct mail marketing designed to raise the over $9,000,000.00 budgeted for the lawsuit by Petitioners. In return, Avirgan and Honey received from The Christic Institute a substantial monthly stipend for their participation in the lawsuit. See 125 F.R.D. at 190.

The District Court therefore had ample basis to find that Avirgan and Honey were thoroughly familiar with the evidence, or lack thereof, to sustain the lawsuit. Avirgan and Honey were wilful participants in the litigation strategy and were properly held liable under the bad faith exception. *Avirgan v. Hull*, 125 F.R.D. 189 (S.D. Fla. 1989).

Likewise, Mr. Sheehan did not act as an ordinary lawyer in this suit. Mr. Sheehan, as chief counsel and investigator of The Christic Institute, personally swore to truth of the allegations of the lawsuit and to the testimony of the alleged "secret sources." He and his wife (who was Executive Director of The Christic Institute) were the main fundraisers. As he said in one of his many speeches about the Christic "Contragate" project:

> "Well, we were quite distressed by this and we felt that we should hurry up and find ourselves a client, since we are an organization that is tax exempt, a public interest organization like American Civil Liberties Union or the NAACP. We were allowed to

engage in fomenting litigating." (R37.1218 Ex. F at 27.)[2]

Therefore, based on the totality of Petitioners' actions, it was predictable that the District Court would find all Petitioners jointly and severally liable for sanctions. As the District Court found:

> The attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint. Plaintiffs' lead counsel, Daniel Sheehan, supplemented the complaint with a detailed affidavit outlining the purported testimony of seventy nine witnesses who Mr. Sheehan stated had factual knowledge that these defendants set and exploded the bomb that caused plaintiff's injuries.
>
> The seventy-nine witnesses were identified only by number. Plaintiffs' counsel refused to identify the names and addresses of the vast majority of the seventy-nine witnesses until ordered to do so by the court. Plaintiffs appealed the order requiring them to disclose the identities of the witnesses. These actions by plaintiffs and their counsel prevented the defendants from taking depositions of these witnesses, and delayed orderly discovery for many months.
>
> After all the appeals were exhausted and plaintiffs complied with the order to reveal the names of their witnesses, the reason for the plaintiffs adamant refusal became apparent. Specifically, the names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or the plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statements that would be admissible. Much of the testimony of these witnesses involved conversations they allegedly had with other people, which is the

[2] "R" is a reference to the Record below.

hearsay testimony inadmissible at trial. 705 F. Supp. 1544, 1545 (S.D. 1989).

Moreover, it was appropriate for the Eleventh Circuit to have found the District Court correct:

> Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit that the complaint was well-grounded in fact. Particularly is this true of the affidavit with its unknown, nonexistent, deceased sources, its fabricated testimony, and the deceptive style used to mask its shortcomings. It is obvious that if the appellants knew (must have known) prior to filing this lawsuit that they had no competent evidence, then, this complaint was not well grounded. Additionally, the District Court stated in its order granting attorney's fees and costs that Sheehan's affidavit was the impetus for the two years of discovery. Yet, this discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing. *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991).

The record on appeal was exhaustive and extensive. It consisted of over 50 volumes. Much of the record was inadmissible, confusing, irrelevant and, in many cases consisted of directly deceptive and fraudulent documents of Petitioners.

On appeal, Petitioners filed extensive Briefs, Motions and numerous applications. They enlisted Amici filings of the following groups: National Council of Churches of Christ in the U.S.A., Church of the Brethren, Church Women United, Conference of Major Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious (Executive Committee), the Maryknoll Fathers and Brothers, and the General Conference Mennonite Church.

There was no evidence ever submitted to support any part of the lawsuit's claims or the appeals. But even on appeal, Petitioners attempted to file "new evidence" of

alleged proceedings in Costa Rica and political documents occurring after the case was dismissed. Respondents were required to answer all of the filings.

Petitioners filed Petitions for Certiorari to this Court to appeal the sanctions of the District Court; Case Nos. 91-617, 91-618, 91-619. They were denied on January 13, 1992.

The Eleventh Circuit granted Respondents' Applications for fees under Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1927, and remanded the case to the District Court for hearing and Judgment on the amount of reasonable fees. The evidentiary hearing is set for October 26, 1992.

SUMMARY OF ARGUMENT

Petitioners have presented no conflict among the Circuits or conflict with decisions of this Court to justify the issuance of a Writ of Certiorari. At best, they argue (inaccurately) that the imposition of sanctions by the Eleventh Circuit was error.

The Eleventh Circuit had ample grounds to determine that the appeals were frivolous. Petitioners misrepresented the Record to the Appellate Court and the submissions they had presented to the District Court. They vexatiously abused the judicial process and refused to abandon meritless appeals for which they knew they had no basis.

The Eleventh Circuit was not required to issue separate, specific findings. The Court followed an established practice among the Circuits. The Panel was thoroughly familiar with the case. The groundlessness of the case was abundantly clear on the face of the record and in the Court's opinion affirming the decisions of the District Court.

ARGUMENT

REASONS FOR DENYING THE WRITS

I. THE RECORD BELOW AND THE APPELLATE COURT'S FAMILIARITY WITH THE MERITS OF THIS CASE SUPPORT ITS FINDING THAT THE APPEAL WAS FRIVOLOUS.

While an unsuccessful appeal of trial court sanctions will not automatically result in the further imposition of sanctions, *Brown v. Nationwide Mutual Insurance Company*, 805 F.2d 1242, 1244 (5th Cir. 1986), sanctions appeals are particularly likely to result in a finding that the appeal is frivolous. As the *Brown* Court added:

> [W]e hasten to add that the appellant should be cautious and circumspect in any appeal involving only sanctions. Such an appeal may justify further sanctions if the sanctions imposed are patently within the trial court's range of discretion and no special circumstances exist. We cannot permit the judicial system, already burdened with frivolous litigation, to be burdened with further frivolous proceedings on the issues of sanctions.

Brown, 805 F.2d at 1244. Indeed, it has been recognized that the wide breadth of trial court discretion with respect to Rule 11 sanctions will, more likely than not, render appeals of such sanctions frivolous. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384; 110 S. Ct. 2447 (1990). In *Cooter & Gell*, this Court stated:

> If the appeal of a Rule 11 sanction is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses. Indeed because the district court has broad discretion to impose Rule 11 sanctions, appeals of such sanctions may frequently be frivolous. See 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice 238.03[2] pp. 38-13, 38-14 (2d ed. 1989) ("[W]here an appeal challenges action or findings of the district court to which an appellate court gives

> deference by judging under an abuse of discretion or clearly erroneous standard, the court is more likely to find that the appellant's arguments are frivolous"). 110 S.Ct. 2447, 2462 (1990).

That opinion further noted that a district court's imposition of Rule 11 sanctions is reviewable only for abuse of discretion.

In this case, the Court of Appeals' plenary review in relation to the entry of Summary Judgment led the Eleventh Circuit to the clear finding that the Complaint in this case was not well grounded in fact and that the case was intentionally pursued without any justiciable basis. The Appeals Court wrote clearly that it had "no difficulty in determining that the proceedings had been unreasonably and vexatiously multiplied by the Appellants." *Avirgan*, 932 F.2d at 1582. In reviewing the sanctions award for abuse of discretion, the Appellate Court determined that the entire case was so obviously frivolous and fraught with abuse that upholding the sanctions award was not even a close call.[3]

Courts consider an appeal frivolous when the result is obvious or the appellant's arguments of error are wholly without merit. *Reliance Ins. Co. v. Sweeney Corp.*,

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[3] Petitioners Avirgan and Honey attempt to distance themselves from Mr. Sheehan by asserting a "pure heart, empty head" defense. See Petition at 13. Courts have uniformly rejected the concept, especially when, as here, appellants have separate counsel. Mr. Sheehan did not solely represent Avirgan and Honey on appeal. See *McCandless v. Great Atlantic & Pac. Tea Co.*, 697 F.2d 198, 200 (7th Cir. 1983). The appeal was a continuation of the sanctionable conduct condemned by unanimous agreement of the federal judiciary. See *Wood v. Commerce, Inc.*, 699 F.2d 484 (9th Cir. 1983). Avirgan and Honey and their appellate counsel should have, but did not, discontinue the abusive action. Under these circumstances there is abundant precedent to hold them individually liable. See *Cowan v. Corley*, 814 F.2d 223 (5th Cir. 1987); *U.S. v. Nesglo*, 744 F.2d 887 (1st Cir. 1984); *McConnell v. Critchlow*, 661 F.2d 116 (9th Cir. 1981).

Maryland, 792 F.2d 1137, 1138 (D.C. Cir. 1986). Therefore "counsel must realize that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk-reaction to every unfavorable ruling." *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984).

Here, Petitioners knew that they had fictionalized the case. They pursued the appeals to raise more money and play appellate roulette. There were no substantive issues, and the issues they manufactured were transparent, albeit laboriously fabricated. For example (there are numerous others):

1. Petitioners blatantly misrepresented that the District Court abused its discretion with respect to discovery. Petitioners charged that Respondent Shackley "adamantly refused to comply with the federal rules governing discovery or court orders compelling discovery" and that he failed to identify documents withheld on the grounds of privilege. These statements were not true and were flatly contradicted by the record. (R.23.787. Exhibit D; R19.655.14).

2. Plaintiffs represented to the Eleventh Circuit that Respondent Hull walked out of his deposition and that the District Court excused Hull from continuing his deposition. On the contrary, Hull submitted to a full day of questioning (R51.1278.118-19) and the District Court scheduled a continued deposition for June 6, 1988 in the United States District Court in Miami (R51.1278.129-30).

3. Plaintiffs represented that Respondent Owen improperly obstructed the discovery process. In fact, the opposite was true.

4. Plaintiffs represented to the Appellate Court that, as of the time of the District Court's award of summary judgment, there were a total of ten outstanding discovery motions which the District Court had failed

to rule upon. On the contrary, of the ten motions that Petitioners represented were undecided, the record shows that five of them actually were decided, one was resolved by agreement among the parties, and the remaining four were not even docketed until after the close of discovery. Moreover, although complaining, as it turned out falsely, about the ten allegedly undecided motions, petitioners failed to point out that the District Court, during the course of proceedings, adjudicated a total of seventy-two discovery motions filed by the parties.

5. Petitioners' appeal of the sanctions order was likewise demonstrably frivolous on the record. Petitioners made little effort to defend on appeal the false and misleading Sheehan Affidavit which sustained two years of litigation. Rather, Petitioners argued that the Sheehan Affidavit was *irrelevant* to the case and could not be the foundation for sanctions—an argument that not only was legally and factually untenable, but which contradicted Petitioners' own position below, where they had described the affidavit to Judge King as a "supplement" to the Complaint, relied on it in opposing summary judgment motions, incorporated it in other pleadings, and made it a centerpiece of their fundraising efforts. (The affidavit was for sale to the public as part of the Christic Institute's "Contragate Project" for $10.00).

Petitioners claim that the enormous work of the Respondents and bulk of the Briefs on Appeal are testament to the legitimacy of the issues and the appeals. The truth is, however, that the Appellee Briefs of Respondents were so extensive and complicated because of the enormity of the Petitioners' fraud, deception, and abuse. Petitioners knew that they had no witnesses and no evidence to sustain a successful appeal. Instead, as they did in the Trial Court, on appeal they simply misrepresented the Record, the depositions, and attempted to "spin" the filings. They

enlisted legions of Amici, armed with tears and Briefs. Respondents were forced to respond.

Respondents were faced with the enormous task of dealing with 1200 docket entries, numerous depositions (some of which were days long), incredibly deceptive affidavits and equally deceptive Appellate Briefs. The sweat was in meticulously slicing the truth from the pages and providing accurate citations to a poorly organized, enormous record. Respondents had to coordinate numerous defendants and their counsel, synthesize arguments and different suggested approaches, and file Consolidated Briefs. It was a monumental task. The Record was over 50 volumes in boxes which were shipped back and forth between three cities. The process took months of concentrated and coordinated effort of numerous sets of lawyers. Contrary to Petitioners' suggestion, no amount has yet been awarded for this effort. That decision is pending an evidentiary hearing to be held, at the direction of the Eleventh Circuit, by the District Court.

Petitioners intentionally made the decision, for purely political purposes, to bring this baseless suit and to join numerous innocent Defendants and to conduct this monstrously large and expensive litigation. They admitted to expending far in excess of $2,000,000.00 on the case themselves. However, as they admitted to the panel at oral argument, "although under the best scenario, they did not expect to collect half that amount." See *Avirgan v. Hull*, 932 F.2d 1572 at 1582, n.13 (11th Cir. 1991).

The appeals were simply another outrageous, expensive extension of the vexatious conduct begun by the Complaint. They were, on their face, sanctionable.[4]

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[4] Petitioners filed Briefs consuming over 100 pages, never admitting that they had no admissible evidence that Respondents caused their injuries, and never explaining why they had submitted fraudulent affidavits. The 11th Circuit panel was fully justified in law in its conclusion of the trivolous nature of the appeals. See *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984); *WSM Inc.*

II. AN APPELLATE COURT IS NOT REQUIRED TO MAKE SPECIFIC, SEPARATE FINDINGS WITH RESPECT TO THE FRIVOLOUSNESS OF AN APPEAL.

Petitioners argue in their Petitions that the Court of Appeals acted in a "wholly arbitrary manner" by imposing sanctions under Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1927 because, they claim, it did not explain its rationale for finding Petitioners' appeals to be frivolous.[5] Indeed, so piqued are the Petitioners that they argue it is fruitless to remand for entry of findings by the Court below which, Petitioners assert, would merely lie to cover up its deficiencies. Not only do Petitioners fail to cite case law that requires a court of appeals to issue specific detailed findings under these circumstances; they fail to acknowledge that the prior opinion of the Court of Appeals contains such findings as would support an award under either Rule 38, 28 U.S.C. § 1927 or both.

The same panel of judges that affirmed the Summary Judgment and Rule 11 sanctions award also ruled upon the petition for appellate fess. Due to this panel's familiarity with the merits, their finding that the appeal was frivolous was reasonable and did not require any more explanation than was included in the prior opinion on the merits. In fact, the panel articulated detailed findings in its opinion affirming Rule 11 sanctions.

Petitioners have shown no conflict among the circuits on this issue. An appellate court has no special duty to articulate its reasons for finding an appeal frivolous. In

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v. Tennessee Sales Co., 709 F.2d 1084 (6th Cir.) *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir. 1984).

[5] Interestingly, in their last Petitions for Certiorari, Petitioners had the same complaint of the District Court sanctions order, wherein the District Court wrote a complete, detailed, separate opinion. See *Avirgan v. Hull*, Supreme Court Case Nos. 91-617, 91-618, 91-619.

a similar case involving an award of costs and attorneys' fees under 28 U.S.C. § 1927 and under Fed. R. App. P. 38, the Tenth Circuit has stated that a Court of Appeals is not required to make specific findings:

> When the court finds an entire appeal frivolous, multiplicious or vexatious, it need say nothing more except to state that conclusion, which obviously is based upon the court's judgment on the merits of the issues. *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987) (en banc).

Petitioners cite no cases requiring specific findings to support a determination that an *appeal* is frivolous. They instead rely on cases relating to Rule 11 awards by a district court. See Petition at 8. The case of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), revolved around the appropriate measure of attorneys' fees awarded to a prevailing plaintiff under 42 U.S.C. § 1988. In *Hensley*, this Court merely noted the importance of the District Court's providing a concise, clear explanation of its reasons for a fee award.

The other cases cited by Petitioners in support of this alleged specific obligation to explain the basis for an appellate attorneys fee award are similarly mischaracterized. For example, *Thomas v. Capitol Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) involved the imposition of Rule 11 sanctions, and the court therein rejected a rule which would require specific findings and conclusions by a district court in all Rule 11 cases.[6] How-

[6] "[W]e adopt a rule today that does not require specific findings and conclusions by a *district court* in all Rule 11 cases. However, the rule we adopt does emphasize the importance of an adequate record for appellate review in those cases in which the violation is not apparent on the record and the basis and justification for the trial judge's Rule 11 decision in not readily discernible . . . We therefore reject a rule that would impose upon district courts the onerous and often time-consuming burden of making specific findings and conclusion in all Rule 11 cases." [emphasis supplied]. *Thomas*, 836 F.2d at 883.

ever, the court did emphasize the importance of an adequate record for appellate review in those cases in which the violation was not apparent on the record. Here, not only is the District Court record painfully extensive, the Appellate Court opinion does contain a justification for the Rule 38 and Section 1927 sanction which is more than "merely discernible." Indeed, the Appellate Court indicated that "on this record we have *no difficulty* in finding that these appellants unreasonably and vexatiously multiplied these proceedings." *Avirgan*, 932 F.2d at 1582. *See also, Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968); *Clark v. Commissioner*, 744 F.2d 1447, 1448 (10th Cir. 1984); *Reliance Ins. Co. v. Sweeney Corp., Maryland*, 792 F.2d 1137, 1138 (D.C. Cir. 1986).

When the frivolity of the appeal is objectively obvious on the face of the record, procedural trappings, such as a hearing, a separate briefing, and a separate sanctions proceeding, are unnecessary. *Romala Corp. v. U.S.*, 927 F.2d 1219, 1226 (Fed. Cir. 1991). In *Romala*, the Court ordered the imposition of Rule 38 sanctions *sua sponte*, stating, "since our imposition of sanctions is thus based on a frivolity that is wholly contained within the written submission, no separate briefing or argument on the issue would be useful." *Id.* at 1226. In addition, the Court noted that due process does not require any specific notice or opportunity for additional briefing or hearing prior to the imposition of Rule 38 sanctions.[7] Likewise, there is no requirement for explicit and separate findings.

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[7] The *Romala* panel indicated that adequate notice is satisfied by the elementary principle that attorneys are expected to know and follow the federal rules of appellate procedure including Rule 38 and the decisions applying it. In addition, it has also been noted that:

> Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the [illegible]

Petitioners claim that Circuits routinely issue comprehensive appellate sanctions opinions. See Pet. at 8. Petitioners then fashion their own appellate rule *requiring* a separate opinion and pronounce the 11th Circuit guilty of violating Petitioners' "Rule." It is simply more fiction.

Case law in the Eleventh Circuit, as well as other circuits, is replete with examples where the court articulates simply, without further findings, that the appeal or claim is "frivolous" and thereupon imposes sanctions. See, for example, *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986), *U.S. v. Nesglo*, 744 F.2d 887 (1st Cir. 1984), *Motes v. United States*, 785 F.2d 928 (11th Cir. 1986); *United States v. Rayco, Inc.*, 616 F.2d 462, 463 (10th Cir. 1980). This case, which had consumed four separate opinions, required no more.

Petitioners have disingenuously argued that the Eleventh Circuit Court of Appeals has "refused"[8] to furnish a rationale for its determination of frivolousness. To the contrary, the very same Court of Appeals panel that made the determination of frivolousness had previously stated its findings in the opinions affirming the trial court's judgment and awards. Petitioners ignore the findings contained in that opinion which specifically underline the frivolousness and vexatious multiplication of the entire litigation.

Petitioners scandalously speculate that should this Court remand the issue for a separate statement of findings,

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state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct. *Hill v. Norfolk and Western Ry.*, 814 F.2d 1192, 1201-02 (7th Cir. 1987).

[8] This "refusal" was in response to Petitioners' unprecedented demand, in a Petition for Rehearing, that the Court of Appeals respond to 11 specific questions posed by Petitioners. See Avirgan and Honey Petition at 27a-31a. This demand is reminiscent of Petitioners' motion in the District Court wherein Mr. Sheehan demanded that Judge King disclose communications with Judge Gessell and answer his impertinent questions about discovery.

the Court of Appeals panel would attempt to improperly justify its order after the fact by providing reasons clothed with "discretion-exercising phrases." These are the same Petitioners, who, after they lost in the District Court, appeared on network news to accuse District Judge King of complicity with the "Secret Team" (Respondents) and President George Bush. Thus, even if the panel had repeated, by separate order what Petitioners claim is absent, they would be here anyway claiming the findings insincere. These word games are Petitioners' *imprimatur* and demonstrate the abuse to which the Federal Judicial Process has been, and continues to be, put.

CONCLUSION

For the foregoing reasons, the Petitions of Avirgan, Honey, The Christic Institute and Daniel Sheehan should be denied.

Respectfully submitted,

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